

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
JUDGES: Kristen F. Kelly, David H. Sawyer, and Kurtis T. Wilder

INTERNATIONAL HOME FOODS, INC.,
Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,
Defendant-Appellant.

Supreme Court No. 130542
Court of Appeals No. 253748
Court of Claims No. 02-000081-MT

LENOX, INCORPORATED,
Plaintiff-Appellee

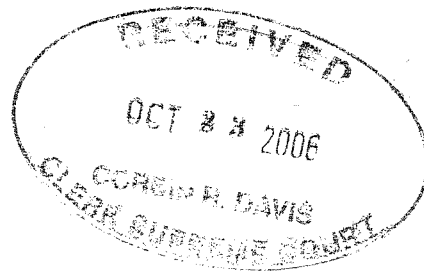
v

DEPARTMENT OF TREASURY,
Defendant-Appellant.

Supreme Court No. 130543
Court of Appeals No. 253760
Court of Claims No. 01-18141-MT

PATRICK R. VAN TIFLIN (P26119)
DANIEL L. STANLEY (P57052)
Honigman Miller Schwartz and Cohn LLP
Attorneys for Plaintiffs-Appellees
222 North Washington Square
Lansing, Michigan 48933
517/ 377-0702

MICHAEL A. COX
Attorney General
THOMAS L. CASEY (P24215)
Solicitor General
ROSS H. BISHOP (P25973)
Michigan Department of Attorney General
Attorneys for Defendant-Appellant
525 W. Ottawa Street
Lansing, MI 48922
517/373-3203



PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
INDEX OF AUTHORITIES.....	iv
COUNTER STATEMENT OF QUESTIONS PRESENTED.....	viii
I. INTRODUCTION.....	1
II. STANDARD OF REVIEW.....	3
III. STATEMENT OF FACTS AND LEGAL BACKGROUND.....	3
A. Facts Specific to Lenox.....	3
B. Facts Specific to IHF.	3
C. Overview Of The SBT Jurisdictional Standard From 1976 To 1993	4
1. SBT Bulletin 1978-3, SBT Bulletin 1980-1 and RAB 1989-46.....	4
2. The <i>Gillette</i> Decision and RAB 98-1	8
D. The Department’s Actions Against Appellees.....	9
1. The Department’s Actions Against Lenox.	9
2. The Department’s Actions Against IHF.	9
E. Proceedings Below.....	10
1. Procedural History of Lenox’s Case.....	10
2. Procedural History of IHF’s Case.....	11
IV. ARGUMENT	12
A. The Court Of Appeals Below Properly Applied <i>D’Amico</i> and Held That The Department Could Not Retroactively Apply Its New Nexus Standard.....	12
B. A New, Contradictory Interpretation Of The Business Activity Nexus Standard Should Apply Prospectively Under Michigan Case Law	19

1.	RAB 98-1 Should Be Prospectively Applied Because of Reliance.....	21
2.	<i>Newsweek</i> Prohibits Bait And Switch In State Tax Administration	24
3.	Prospective Application of a New Standard is Preferred Under Michigan Case Law	25
C.	The Department’s Position Ignores The Plain Language Of The SBTA	28
D.	Appellees Did Not Have Sufficient Nexus With Michigan To Justify Imposition of SBT.....	30
E.	The Department’s Retroactive Change of the Statutory Jurisdiction Standard Violates The Commerce Clause	33
1.	Whether a Retroactive Change in the Statutory Jurisdiction Standard Violates the Commerce Clause Nondiscrimination Requirement Has Not Been Addressed By Any Court.....	33
2.	A Retroactive Change of the Statutory Jurisdiction Standard Discriminates Against Interstate Commerce in Violation of the Commerce Clause.....	35
3.	The Department’s “Bait and Switch” Tactics Violate The Commerce Clause Because They Discriminate Against Interstate Commerce	36
(a)	Retroactively Declaring Out-of-State Businesses Are Subject to Single Business Tax Discriminates Against Interstate Commerce.....	36
(b)	Retroactively Expanding the Statutory Nexus Standard Results In Discriminatory Double Taxation of Out-Of-State Businesses Engaged In Interstate Commerce	37
(c)	Retroactively Changing the Statutory Nexus Standard Discriminated Against Interstate Commerce By Handicapping Out-Of-State Businesses	41
(d)	Because The Department’s Actions Discriminate Against Interstate Commerce, They Are Invalid Under The Commerce Clause	42

4.	The Department’s Retroactive Expansion of the Business Activity Nexus Standard Violates The Commerce Clause Because It Imposes An Undue Burden Upon Interstate Commerce	42
F.	The Department Is Estopped From Retroactively Changing The Business Activity Nexus Standard.....	44
G.	It Is Undisputed That There Is A Genuine Issue Of Material Fact Regarding IHF’s SBT Liability	47
V.	CONCLUSION	49

INDEX OF AUTHORITIES

Cases

<i>Acco Brands, Inc. v Dep't of Treasury</i> , unpublished decision per curiam of the Court of Appeals (Docket No. 242430, November 20, 2003)	22, 29, 44
<i>American Trucking Assns, Inc v Scheiner</i> , 483 US 266 (1987).....	49
<i>Ashland Oil, Inc v Caryl</i> , 497 US 916; 110 S Ct 3202; 111 L Ed 2d 734 (1990)	44
<i>Brecht v Abrahamson</i> , 507 U.S. 619; 113 SCt 1710; 123 L Ed2d 353 (1993).....	27
<i>C & A Carobone v Town of Clarkstown</i> , 511 US 383; 128 L Ed 2d 399; 114 S Ct 1677 (1994).....	45
<i>Campbell v Dep't of Treasury</i> , 77 Mich App 435; 258 NW2d 508 (1977).....	32
<i>Cities Service Gas Co v Peerless Oil & Gas Co</i> , 340 US 179 (1950).....	54
<i>Comm'r of Rev v Bay Middlesex</i> , 659 NE2d 1186 (1996).....	33
<i>Complete Auto Transit, Inc v Brady</i> , 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977)	43
<i>Cosmair, Inc. v Dep't of Treasury</i> , unpublished opinion per curiam of the Court of Appeals (Docket No. 198240, March 20, 1998).....	29
<i>Detroit v Public Utilities Comm'n</i> , 288 Mich 267, 286 NW 368 (1939)	27
<i>Devillers v Auto Club Ins. Ass'n</i> , 473 Mich 562; 702 NW2d 539 (2005).....	13
<i>First Chicago NBD Corp v Dep't of State Rev</i> , 708 NE2d 631 (1999).....	49
<i>Gillette v Dep't of Treasury</i> , 198 Mich App 303; 497 NW2d 595 (1993)	passim
<i>Goldberg v Sweet</i> , 488 US 252 (1989)	49
<i>Guisse v Robinson</i> , 219 Mich App 139; 555 NW2d 887 (1996).....	55
<i>In re Appeal of Kelly Services, Inc</i> , 1997 WL 466851 (Cal St Bd Eq May 8, 1997)	49
<i>In re D'Amico Estate</i> , 435 Mich 551; 460 NW2d 198 (1990)	passim
<i>JW Hobbs Corp v Dep't of Treasury</i> , 268 Mich App 38; 706 N.W.2d 460 (2005)....	25, 26, 27, 29
<i>Kellogg Sales Co v Dep't of Rev</i> , 10 Or Tax 480, 1987 WL 18463 (1987)	49

<i>Kostyu v Dep't of Treasury</i> , 170 Mich App 123; 427 NW2d 566 (1988)	58
<i>Libby, McNeil & Libby v Wisconsin Dep't of Taxation</i> , 260 Wis 551; 51 NW2d 796, 800 (1952)	59
<i>Line v Michigan</i> , 173 Mich App 720; 434 NW2d 224 (1988), <i>lv den</i> 433 Mich 897 (1989) 35, 36, 37	
<i>Maine v Taylor</i> , 477 US 131; 106 S Ct 2440; 91 L Ed 2d 110 (1986)	52
<i>Marrero v McDonnell Douglas Capital Corp</i> , 200 Mich App 438; 505 NW2d 275 (1993)	55
<i>Michigan State Bank v Hammond</i> , 1 Doug 527 (Mich 1845)	27
<i>Moinet v Burham, Stoepel & Co</i> , 143 Mich 489; 106 NW 1126 (1906)	26
<i>National Geographic v California Board of Equalization</i> , 430 US 551; 97 S Ct 1386; 50 L Ed 2d 163 (1977)	42
<i>Newsweek, Inc v Florida Dep't of Rev</i> , 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998)	34
<i>Oklahoma Tax Comm v Jefferson Lines</i> , 514 US 175; 115 S Ct 1331; 131 L Ed 2d 261 (1995)	49
<i>Penn Mutual Life Ins Co v Dep't of Licensing & Regulation</i> , 162 Mich App 123; 412 NW2d 668 (1987), <i>lv den</i> 329 Mich 871 (1988)	37, 38
<i>People ex rel Blair v Mich Cent R Co</i> , 145 Mich 140; 108 NW 772 (1906)	31
<i>People v Alter</i> , 255 Mich App 194 n.1; 659 NW2d 667 (2003)	26
<i>People v Doyle</i> , 203 Mich App 294; 512 NW2d 59 (1994) <i>rev'd on other grounds</i> 451 Mich 93 (1996)	26
<i>Quill Corp v North Dakota</i> , 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992)	41, 42, 54
<i>Rauenhorst v Comm'r</i> , 119 TC 157 (2002)	32
<i>Rayovac Corporation v Dep't of Treasury</i> , 264 Mich App 441; 691 NW2d 57 (2004) ..	25, 26, 27
<i>Redken Laboratories v Dep't of Treasury</i> , unpublished opinion per curiam of the Court of Appeals (Docket No. 221439; Sept. 18, 2001)	29
<i>Reich v Collins</i> , 513 US 106; 130 L Ed 2d 454; 115 S Ct 547 (1994)	34
<i>Sizemore v Smock</i> , 430 Mich 283; 422 NW2d 666 (1988)	26
<i>Southern Pacific Co v Arizona</i> , 325 US 761; 89 L Ed 1915; 65 S Ct 1515 (1944)	45

<i>Syntex Laboratories v Dep't of Treasury</i> , 233 Mich App 286; 590 NW2d 612 (1998)	25, 26
<i>Terra Energy, Ltd v State</i> , 211 Mich App 393; 616 NW2d 691 (2000)	26
<i>Topps Co, Inc v Dep't of Treasury</i> , unpublished opinion per curiam of the Court of Appeals (Docket No. 203495, June 11, 1999)	29
<i>Trinova v Michigan Dep't of Treasury</i> , 498 US 358; 111 S Ct 818, 836; 112 L Ed 2d 884 (1991)	47
<i>Vomvolakis v Dep't of Treasury</i> , 145 Mich App 238; 377 NW2d 309 (1985)	58
<i>Washtenaw Co v Tax Comm</i> , 422 Mich 346; 373 NW2d 697 (1985)	38
<i>West Lynn Creamery, Inc v Healy</i> , 512 US 186; 114 S Ct 2205; 129 L Ed 2d 157 (1994)	54
<i>Wisconsin Dep't of Revenue v William Wrigley, Jr, Co</i> , 505 US 214; 112 S Ct 2247; 120 L Ed 2d 174 (1992)	42
<i>World Book v Dep't of Treasury</i> , 495 Mich 403; 590 NW2d 293 (1999)	16
<i>Wyoming v Oklahoma</i> , 502 US 437; 117 L Ed 2d 1; 112 S Ct 789 (1992)	53

Statutes and Public Acts

1998 PA 225	7
Internal Revenue Code Section 7805(b)	22
MCL 205.3(f)	43
MCL 208.3	49
MCL 208.3(2)	passim
MCL 208.31	28, 29, 30, 31
MCL 208.42	7, 34
MCL 208.52(b)	37
MCL 208.581	37
MCL 24.203(6)	29, 43
Public Law 86-272	passim
Single Business Tax Act	2

Other Authorities

Enrich, <i>Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business</i> , 110 Harv L Rev 377 (1996)	36
Hellerstein, <i>State Taxation</i> , 3 rd Ed (2000)	35, 40
Kasischke, <i>Tax Notes</i> , Michigan Bar Journal, June 1978 at p. 435	5
Revenue Administrative Bulletin 1989-34	8, 22
Revenue Administrative Bulletin 1998-1	passim
Revenue Administrative Bulletin 89-46	passim
Sands, Sutherland, <i>Statutory Construction</i> (4 th ed).....	21
Single Business Tax Bulletin 1978-3.....	5
Single Business Tax Bulletin 80-1.....	passim

Rules

MCR 7.215(C)(1).....	19, 33
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Constitutional Provisions

US Const, art I, §8, cl 3.....	35
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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. In *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990), the Court held that the Department of Treasury must prospectively apply a new taxing standard. Did the Court of Appeals below correctly rely upon *D'Amico* when it held that the Department must prospectively apply a new Single Business Tax ("SBT") nexus standard?

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

The Court of Appeals answers "Yes."

2. Do Plaintiffs-Appellees' contacts with Michigan through two (in the case of Lenox) or eight to ten resident (in the case of International Home Foods) sales solicitors constitute "business activity" sufficient for the imposition of SBT under either the statutory requirement of the SBT Act or the relevant constitutional standards?

Defendant-Appellant answers "Yes."

Plaintiff-Appellee answers "No."

The Court of Appeals did not address this question.

The trial court answers "No."

3. State actions that discriminate against or burden interstate commerce violate the Commerce Clause.

- a. Does the Department's retroactive application of a new expanded SBT statutory jurisdiction standard discriminate against interstate commerce?

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

The Court of Appeals did not address this question.

The trial court answers "No."

- b. Does the Department's retroactive application of a new expanded SBT statutory jurisdiction standard that contradicts the contemporaneous published nexus standard unconstitutionally burden interstate commerce?

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

The Court of Appeals did not address this question.

The trial court answers "No."

4. Should the Department prospectively apply a new expanded interpretation of the business activity nexus standard that goes beyond the holding of *Gillette v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993), when it contradicts the Department's contemporaneous published standard relied upon by taxpayers?

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

The Court of Appeals answers "Yes."

The trial court answers "No."

5. Is the Department estopped, under either equitable estoppel or promissory estoppel, from using a SBT statutory jurisdiction to tax standard other than the standard the Department announced would be used when Appellant and other taxpayers reasonably relied upon the Department's announced statutory nexus standard?

Appellant answers "Yes."

Appellee answers "No."

The trial court answers "No."

6. Did the trial court reversibly err in granting summary disposition to the Department of Treasury when, even assuming the Department's legal theory is correct and Plaintiff-Appellee International Home Foods, Inc is liable for Single Business Tax, both parties acknowledge the existence of a disputed issue of material fact regarding the amount of the tax liability?

Defendant-Appellant answers “No.”

Plaintiff-Appellee answers “Yes.”

The Court of Appeals did not address this issue.

The trial court answers “No.”

I. INTRODUCTION

In 2001, the Michigan Department of Treasury (“Department”) assessed Plaintiff-Appellee, Lenox, Incorporated (“Lenox”), for the period from May 1, 1989 through April 30, 1990 based upon the Department’s contention that Lenox was subject to the Michigan Single Business Tax (“SBT”). The Department contended that Lenox was subject to SBT because Lenox had two employees resident in Michigan who were responsible for soliciting orders for purchases of Lenox’s products in Michigan and Ohio. In 2002, the Michigan Department of Treasury (“Department”) assessed Plaintiff- Appellee, International Home Foods, Inc. (“IHF”), for the period from January 1, 1989 through October 31, 1996 (the “years in issue”) based upon the Department’s contention that IHF was subject to SBT due to its employees activities in soliciting sales in Michigan.¹ However, the Department had issued guidance to businesses in 1980 (and reiterated that guidance in 1989) that a business was not subject to SBT if it had resident employees in Michigan who engaged in sales solicitation.

Fundamentally, this case is about fairness. After years of telling out-of-state taxpayers like Lenox that they were not subject to taxation under the SBT if they limited their Michigan presence, the Department reversed its position and retroactively assessed SBT upon Lenox and IHF (collectively, “Appellees”). Despite the fact the Department did not rescind or revoke its prior published guidance until February 1998, the Department assessed tax upon Appellees for tax periods beginning in 1989. In assessing Appellees, the Department applied, nine years retroactively, a new jurisdictional taxation standard vastly expanded beyond the Department’s

¹ It is undisputed that the Department’s tax assessment for IHF for the period from January 1, 1989 through December 31, 1992, was an **estimated** amount that did not reflect IHF’s actual tax liability. Thus, there is a genuine issue of material fact regarding IHF’s tax liability for this period even if IHF is liable for SBT. Despite this genuine issue of fact, the trial court erroneously granted summary disposition to the Department.

prior published statutory nexus standard for the years in issue.

The Court of Appeals below held that the Department's attempt to retroactively change the rules of the game was unlawful based upon this Court's decision in *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990). In *D'Amico*, the Court held that the Department must prospectively apply a new taxing standard.

The Department claims throughout its Brief that it is merely enforcing a "court mandated" nexus standard. In doing so, the Department is attempting to mislead the Court. No court decision ever mandated that the Department retroactively apply a broader nexus standard – this was something the Department unilaterally decided to do. The Department's attempt to lay the blame for its unfair and inequitable behavior on the courts is baseless. The Department's position is incorrect because SBT is only imposed upon business that engages in "business activity," which is a defined term in the Single Business Tax Act ("SBTA"). Appellees' activity in Michigan did not meet that statutory definition of "business activity."

The Commerce Clause of the U.S. Constitution also does not allow the retroactive application of a new statutory jurisdictional standard. Appellees' position that the Department's attempt to retroactively change the rules of the game is invalid and unconstitutional is supported by the testimony of Professor Richard D. Pomp, a nationally recognized expert on state taxation who has testified as an expert witness for taxing authorities as well as taxpayers. Moreover, the Department's attempts to retroactively apply a new statutory jurisdictional standard is an unconscionable miscarriage of justice that penalizes taxpayers who relied on the word of the Department that SBT taxes were not due under the statutory nexus standard in force during the years in issue and violates Michigan law.

II. STANDARD OF REVIEW

The issues raised in this appeal are all issues of law, which are reviewed *de novo*. *Devillers v Auto Club Ins. Ass'n*, 473 Mich 562, 566; 702 NW2d 539 (2005).

III. STATEMENT OF FACTS AND LEGAL BACKGROUND

A. Facts Specific to Lenox.

The facts in this case are undisputed.² During the May 1, 1989 through April 30, 1990 time period, Lenox was primarily engaged in the manufacturing and distribution of china, crystal, and luggage (“Products”), in interstate commerce. App 38a, ¶15. Lenox had two employees resident in Michigan. App 38a, ¶19. The two employees were responsible for soliciting orders for purchases of Lenox’s products in Michigan and Ohio. App 38a, ¶¶ 20-21.

Lenox’s Michigan employees had no authority to approve or accept orders. App 38a, ¶17. All requests for purchases of Lenox’s products were approved by Lenox outside Michigan. App 38a, ¶17. Lenox had no office, property or inventory in Michigan. App 38a, ¶¶18, 22.

Lenox maintained this structure for its sales activity in Michigan, and limited its activity in this way, in order to avail itself of the protection from taxation offered by the Department in its stated jurisdictional standard described in RAB 1989-46.

B. Facts Specific to IHF.

Again, the facts regarding IHF are essentially undisputed.³ During the years in issue, IHF was primarily engaged in producing, marketing and selling prepared pastas and other entrees,

² The Court can confirm that the facts are undisputed by comparing the facts alleged in Lenox’s Complaint, App 36a-38a, with the facts alleged in the Department’s Brief in Support of Defendant’s Motion for Summary Disposition, which was filed with the Court of Claims on May 28, 2003. As the Court can see, the facts alleged in the Department’s Brief are taken straight from the Complaint and the Complaint is cited as the source for those facts.

³ The Court can confirm that the facts are mostly undisputed by comparing the facts alleged in IHF’s Complaint, App 34a-42a, with the facts alleged in the Department’s Amended Brief in

regional specialty foods, condiments, snack products, spreadable fruit products and other food products (“Products”), in interstate commerce. For the years in issue, IHF had eight to ten employees resident in Michigan. *See* App 42a, ¶ 22. During the years in issue, the sole responsibility of IHF’s Michigan employees was the solicitation of orders for IHF’s products.

IHF’s Michigan employees had no authority to approve or accept orders. All requests for purchases of the IHF’s products were accepted and approved by the IHF’s principal office in New York, New York. Furthermore, deliveries were coordinated and shipping information was provided to IHF’s customers by the IHF principal office.

IHF’s Michigan employees worked out of their homes. IHF did not maintain an office in Michigan, nor did it own, lease or maintain property of any kind in Michigan. IHF maintained this structure for its sales activity in Michigan, and limited its activity in this way, in order to avail itself of the protection of the Department’s stated jurisdictional standard in RAB 1989-46.

C. Overview Of The SBT Jurisdictional Standard From 1976 To 1993

1. SBT Bulletin 1978-3, SBT Bulletin 1980-1 and RAB 1989-46

Out-of-state businesses may be subject to the Michigan SBT only when the activity of those businesses has a relationship with or “nexus” to the State of Michigan. There are three separate nexus thresholds a business must cross to be subject to tax: 1) Jurisdiction must exist under U.S. Constitutional standards; 2) No federal statute prevents exercise of jurisdiction; and 3) Michigan’s statutory business activity nexus standard must be met. The Due Process and Commerce Clauses of the U.S. Constitution provide the **constitutional** limit of Michigan’s

Support of Defendant’s Motion for Summary Disposition, which was filed with the Court of Claims on July 22, 2003. As the Court can see, the facts alleged in the Department’s Brief are taken straight from the Complaint and the Complaint is cited as the source for those facts. There is one material disputed fact – the amount of IHF’s SBT liability if IHF is liable for SBT. This is explained in Section IV.G below.

jurisdiction to impose single business tax. MCL 208.3(2) provides the Michigan **statutory** limits. The statutory nexus limit is “business activity,” defined under MCL 208.3(2) as:

A transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to an employer, services as a director of a corporation or a casual transaction.

After the 1976 enactment of the SBT, the Department, in fulfillment of its responsibility to interpret and administer the SBT, promulgated bulletins describing the statutory jurisdictional standard for an out-of-state business. The Department first attempted to interpret the SBT business activity nexus standard as extending to the full extent of the Due Process and Commerce Clause in Single Business Tax Bulletin 1978-3 (“SBT Bulletin 78-3”), App 1b-3b. *See also* Kasischke, *Tax Notes*, Michigan Bar Journal, June 1978 at p. 435. In so doing, the Department determined that Michigan’s jurisdiction to tax was not limited by Public Law 86-272 (“PL 86-272”) (the federal statutory limit), which excludes a person from state jurisdiction to impose a “net income tax” on the income derived from interstate commerce if the person’s only business activities within the state are the solicitation of orders for sales of tangible personal property sent outside the state for approval or rejection and filled by shipment or delivery from a point outside the state. *Id.* Two years later, the Department changed its interpretation of the SBT nexus standard. The Department knew it had no legal basis to apply PL 86-272, so it interpreted the statutory business activity nexus standard of MCL 208.3(2) not to extend to the full extent of constitutional limits.⁴ Because business activity under MCL 208.3(2) requires

⁴ Michigan is not required to exercise its taxing jurisdiction to the full extent of the U.S. Constitution and many states do not. See Affidavit of Professor Pomp, (App 4b-13b and 62b-68b). Professor Pomp’s Affidavit was attached as Exhibit 1 to Plaintiff’s Brief in Opposition to Defendant’s Motion for Summary Disposition.

transfer of legal or equitable title within the state, the Department took the reasonable position that in-state presence of a sales solicitor conducting activities protected under PL 86-272 where the sale occurred outside of the state⁵ does not constitute business activity under MCL 208.3(2) subject to the SBT.⁶ Thus, on May 1, 1980, the Department promulgated “SBT Bulletin 80-1,” *Single Business Tax Jurisdictional Standard* (App 2a-3a), which declared:

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. When the employee representing the taxpayer goes beyond the solicitation of sales and provides services for the customer, including but not limited to technical assistance, inventory, stock rotation, or services for the employer, including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim, sufficient nexus is established. [The “**Employee Sales Solicitation Nexus Standard**”].

The Department declared that the court cases developed under PL 86-272 would be a guide for interpreting this Employee Sales Solicitation Nexus Standard. On May 31, 1989, during the years at issue, the Department issued RAB 89-46 *Single Business Tax Jurisdictional Standard* (App 4a-7a), replacing SBT Bulletin 80-1 but reiterating the Employee Sales Solicitation Nexus Standard.

SBT Bulletin 80-1 and RAB 89-46 also describe and discuss the separate tax base apportionment standard used to determine when sales made by a business in Michigan⁷ to a

⁵ See *World Book v Dep’t of Treasury*, 495 Mich 403, 411-412; 590 NW2d 293 (1999) (sales of goods shipped from out-of-state location by common carrier held as a matter of law to have been completed outside of Michigan).

⁶ See App 11b (Affidavit of Professor Pomp) at ¶46, testifying that even though PL 86-272 does not apply to the SBT, the State can limit its taxing jurisdiction by applying standards similar to PL 86-272.

⁷ The apportionment standard under MCL 208.42 only applies to businesses that are already within Michigan’s jurisdiction to tax. Thus, MCL 208.42 and cases decided thereunder provide no guidance on whether a business is subject to Michigan’s jurisdiction to tax in the first instance.

customer in another state will nonetheless be deemed to be Michigan sales for sales factor apportionment. The statutory apportionment standard for these “throwback” sales is governed by MCL 208.42, which provides:⁸

For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not.

Sales are not thrown back if another state actually taxes the Michigan business or could theoretically tax the Michigan business – under **constitutional** jurisdictional limitations – even if the state does not exercise the jurisdiction to tax. The Department’s SBT Bulletin 80-1 and RAB 89-46 declared that the apportionment standard for throwback sales was the same as the Employee Sales Solicitation Nexus Standard under SBT Bulletin 80-1 and RAB 89-46, for §3(2) business activity nexus, even though the legislature used completely different language in the two provisions.

In issuing SBT Bulletin 80-1 and RAB 89-46, the Department expected persons to rely upon, and required compliance with, the Department’s Employee Sales Solicitation Nexus Standard as the jurisdictional standard for imposition of tax under the SBTA. In Revenue Administrative Bulletin 1989-34 (“RAB 89-34”) (App 14b-16b), issued April 25, 1989 (one month prior to RAB 89-46), the Department explicitly stated that its Bulletins are legally binding and state the official position of the Department. (See App 14b).

Reassured by RAB 89-34 and in reasonable reliance upon the Employee Sales

⁸ The throwback of sales from a state in which the taxpayer is not taxable was repealed by 1998 PA 225 effective July 1, 1998. Throwback of sales was always a fictional treatment, because the sales actually occurred in the customer’s state. The justification for throwback was to ensure that sales were included in the apportionment formula in at least one state.

Solicitation Nexus Standard stated in SBT Bulletin 80-1 and RAB 89-46, Appellees limited their business activity within the State of Michigan in order to come within the protections afforded by that standard. Appellees confined their activities in Michigan to the solicitation of orders for sales of products, sent outside the State for approval and filled by shipment from a point outside the State. Appellees could have altered their behavior by either further limiting their contact, or expanding their contact and filing SBT returns, had the Department not interpreted the business activity nexus standard in MCL 208.3(2) as it did under SBT Bulletin 80-1 and RAB 89-46. In fact, in 1990, Lenox opened an outlet store at Birch Run and, following the direction of RAB 89-46, began filing SBT returns and paying SBT.

2. The *Gillette* Decision and RAB 98-1

On March 1, 1993, the Michigan Court of Appeals, *sua sponte*, held that 1) the federal statutory jurisdictional restriction of PL 86-272 did not apply to the SBTA, 2) sufficient nexus existed under both the Due Process and Commerce Clauses to allow state taxation of an out-of-state business with eighteen full-time resident employees in the state, and 3) Michigan's statutory jurisdictional standard of "business activity" was met by the full-time in-state presence of eighteen employees and inventory. *Gillette, supra*. The *Gillette* decision was not final until the U.S. Supreme Court denied certiorari in 1995.

Five years after *Gillette*, the Department finally replaced RAB 89-46, and then it purported to do so with nine years of retroactive effect. On February 24, 1998, the Department issued Revenue Administrative Bulletin 1998-1 entitled *Single Business Tax Nexus Standards* (App 8a), which dramatically expands the *Gillette* decision and applies the expansion retroactively. RAB 98-1 provides that, after January 1, 1989, substantial nexus is presumed when a nonresident employee is temporarily present in Michigan for two or more days in any year performing solicitation of sales, regardless of whether the business has inventory in the

state.

D. The Department's Actions Against Appellees.

1. The Department's Actions Against Lenox.

The Department audited Lenox and, on October 2, 2001, issued Bill for Taxes Due (Final Assessment) I162871 (the "Final Assessment"), alleging a single business tax liability for the period May 1, 1989 through April 30, 1990 of \$37,831 together with interest in the amount of \$37,858, for a total purported liability of \$75,689. On October 15, 2001, Lenox paid the Final Assessment under protest and initiated suit for a refund of single business taxes and interest paid in the amount of \$75,689, plus statutory interest, costs and attorney fees.

2. The Department's Actions Against IHF.

In 1998 and 1999, the Department audited IHF. During this audit, the Department attempted to audit IHF for the time period from January 1, 1989 through October 31, 1996. IHF was understandably bewildered by the Department's attempt to audit IHF for the prior ten year period, when the Department had only changed its Revenue Administrative Bulletin regarding nexus the year before in 1998. IHF allowed the Department to audit it with respect to the time period from January 1, 1993 through October 31, 1996, but did not provide records or information from any earlier period.

On January 10, 2002, the Department issued to IHF a Bill for Taxes Due (Final Assessment) J750332 (the "First Final Assessment"), alleging a single business tax liability for the period January 1, 1993 through October 31, 1996 of \$13,840, together with interest in the amount of \$7,331.37, for a total purported liability of \$21,171.37.

On January 10, 2002, the Department issued to IHF a Bill for Taxes Due (Final Assessment) J775288 (the "Second Final Assessment"), alleging an **estimated** single business tax liability for the period of January 1, 1989 through December 31, 1992 of \$529,396, together

with interest of \$404,682.08, for a total purported liability of \$1,035,078.08. The amount of SBT assessed by the Department in the Second Final Assessment is estimated and does not correctly reflect the statutory calculation of IHF's SBT liability for the years in issue. *See* App 51b-53b. The amount of SBT assessed by the Department in the Final Assessment is merely an amount fabricated by the Department that bears no relationship to IHF's actual SBT liability for the years in issue. If IHF is subject to SBT during the period from January 1, 1989 through December 31, 1992, its SBT liability is, at most, \$300,507, plus interest, for a total actual liability of \$579,028.09. *See* App 51b-53b.

On February 11, 2002, IHF paid the purported liability on the First Final Assessment and Second Final Assessment (collectively, the Final Assessments), and additional interest, in the amount of \$1,056,249.45, under protest. IHF brought suit seeking a refund of single business taxes and interest paid in the amount of \$1,056,249.45, plus statutory interest, costs and attorney fees.

E. Proceedings Below

1. Procedural History of Lenox's Case.

On May 28, 2003, the Department filed a Motion for Summary Disposition on all five counts in Lenox's Complaint. On June 11, 2003, Lenox filed a Brief in Opposition to that Motion. Thus all issues raised in the Complaint were preserved below. On August 22, 2003, the Court of Claims granted partial summary disposition to the Department with respect to all Counts in Lenox's Complaint except Counts II and IV. On October 1, 2003, Lenox filed a Motion for Summary Disposition with regard to Counts II and IV. On December 5, 2003, the Court issued an Opinion and Order granting summary disposition to the Department on Counts II and IV.

Lenox appealed the Court of Claims decision and briefed all the Counts in its Complaint to the Court of Appeals. The Court of Appeals reversed the Court of Claims, holding that this Court's decision in *D'Amico, supra*, required that the Department's expanded nexus standard be applied prospectively.

2. Procedural History of IHF's Case.

IHF's Complaint contained seven Counts. These Counts are based on: (I) violation of the Commerce Clause due to discrimination or undue burdening of interstate commerce; (II) violation of right to fair and just treatment; (III) the Department is bound by its guidelines under the Michigan Administrative Procedures Act; (IV) the Department's assessment is barred by laches; (V) The Department's actions violate IHF's rights to Due Process; (VI) the Department is barred by estoppel from contesting its prior promulgated SBT nexus standard; and (VII) the Department's assessment is factually incorrect.

On April 17, 2003, the Department filed a Motion for Summary Disposition on all seven counts in IHF's Complaint. On September 9, 2003, IHF filed a Brief in Opposition to that Motion.

At oral argument, the Department admitted that there remained a disputed question of material fact regarding Count VII of IHF's Complaint, which alleged that the amount of SBT assessed was erroneous even if IHF is liable for SBT. Specifically, the Department's counsel stated: "[a]nd regarding the issue of error, I think it would have been nice if they had shown the auditors the records. But if the Court finds for the Department, I am sure they can work out what the correct tax amount is." App 59b (Transcript of October 30, 2003 Motion Hearing).

On December 5, 2003, the Court of Claims granted summary disposition to the Department with respect to all Counts in IHF's Complaint. The Court of Claims did not analyze the seven counts in IHF's Complaint but merely granted summary disposition because of the

Court of Appeals decision in *Acco Brands, Inc. v Dep't of Treasury*, unpublished decision per curiam of the Court of Appeals (Docket No. 242430, November 20, 2003).

IHF appealed the Court of Claims decision and briefed all the Counts in its Complaint to the Court of Appeals. The Court of Appeals reversed the Court of Claims, holding that this Court's decision in *D'Amico, supra*, required that the Department's expanded nexus standard be applied prospectively.

IV. ARGUMENT

A. The Court Of Appeals Below Properly Applied *D'Amico* and Held That The Department Could Not Retroactively Apply Its New Nexus Standard.

Standard of Review

The standard of review is stated in Section II hereof and incorporated by reference.

Preservation of Issue

The challenge to the retroactivity of the Department's new expanded nexus standard was raised throughout Appellees' Complaints, addressed in the Department's Motion for Summary Disposition and in Appellees' Responses thereto. The issue was also briefed to the Court of Appeals.

The Court of Appeals below properly relied upon this Court's decision in *D'Amico*. In 1977, the Department issued a letter stating its interpretation that lottery proceeds were exempt from inheritance tax. *Id.* at 558-559 and n. 10. Six years later, the Department reversed field and issued a letter announcing that it was abandoning its original interpretation based on a court case upholding the new position. *Id.* at 559, n. 11. The Court prohibited the Department from retroactively applying the new standard to redetermine the tax since the public had relied on the Department's prior interpretation. 435 Mich at 560 (quoting *Sands, Sutherland, Statutory Construction* (4th ed) §49.05, p. 362). The Court held that taxpayers engaging in activities in

reliance on the Department's position should be afforded the contemporaneous construction of the law. *Id.* at 564. The *D'Amico* Court held that an administrative agency having interpretative authority may reverse its prior interpretation, but the new interpretation will apply prospectively from the date of the Department's issuance of a new standard. The same rationale applies here. The Department should be precluded from retroactively enforcing RAB 98-1 changing the interpretation of the business activity jurisdictional standard, when taxpayers such as Appellees have long relied on the Department's interpretation.

In *D'Amico*, the Court noted that the Department's construction of tax statutes is "entitled to great weight." *Id.* at 559. The Court also noted:

Interpretations and application of regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute have great weight in determining the operation of a statute. The greatest weight attaches to an administrative interpretation in favor of parties who have reasonably relied upon it.

Id. at 560 (quoting Sands, Sutherland, Statutory Construction (4th ed) §49.05, p. 362, emphasis in the original).

The Court held that taxpayers engaging in activities in reliance on the Department's position should be afforded the contemporaneous construction of the law. *Id.* at 564. The Court held that the Department, the administrative agency having interpretative authority, was bound by its contemporaneous construction of the statute. The Department may reverse its prior interpretation, but the new interpretation will apply prospectively from the date of the Department's issuance of a new standard.

This case is on all fours with *D'Amico* and, as the Court of Appeals properly held below, the Department should be similarly bound by its contemporaneous interpretation. Like the taxpayer in *D'Amico*, Appellees were not subject to tax under the Department's contemporaneous interpretation of the business activity nexus standard of the SBTA. As in

D'Amico, the Department subsequently reinterpreted the statute. As it did in *D'Amico*, the Department has attempted to retroactively change its prior position that the taxpayer had no tax liability. Under *D'Amico*, the Department is precluded from retroactively enforcing RAB 98-1 and that bulletin should be applied prospectively from February 24, 1998.

The Department argues that *D'Amico* is distinguishable because that case “simply does not address the retrospective application of a *court-mandated* change in a state agency’s prior interpretation or policy.” Department’s Brief at 25 (emphasis in original). That argument is incorrect for at least three reasons. First, no court case mandated that the Department retroactively apply a new nexus standard, so the Department’s attempt to blame the courts for its inequitable behavior fails. Second, the Department’s change of position in *D'Amico* was the result of a court decision. See *D'Amico, supra*, 435 Mich at 559, n.11 (noting that the Department’s change in position was the result of a court case in Macomb County). Third, as the Court of Appeals held below, the Department’s attempt to distinguish *D'Amico* on any principled basis fails. The Court of Appeals below addressed the Department’s contention as follows:

Defendant attempts to distinguish *D'Amico* on the basis that in *D'Amico* the defendant had voluntarily changed its position on the interpretation of the law while in *Gillette* the change of position was imposed by this Court in its decision. Defendant relies upon an unpublished decision of this Court that held that *D'Amico* does not apply to the *Gillette* line of cases because in *D'Amico* defendant changed its position and then litigated the change, while in *Gillette* the change was forced upon defendant by this Court. We are not bound by unpublished decisions of this Court and choose not to follow that decision because it was incorrectly decided.

Nothing in the rationale of *D'Amico* would support a distinction between cases where defendant chooses first to change its position and those where the change is prompted by a court decision. Indeed, the rationale behind binding defendant to its interpretive positions is that taxpayers reasonably rely upon those interpretations. A taxpayer will have made any number of decisions based upon its view of the tax laws, such as the

determination of profits and whether to reinvest those profits or pay dividends on, its pricing structure, how it reports income on tax returns in other jurisdictions, and, potentially, even whether to do business in this state. While a taxpayer's interpretation of tax law is always subject to a determination that that interpretation is incorrect, *D'Amico* recognizes that a taxpayer should be able to proceed in reasonable reliance on defendant's official positions. And a taxpayer's reliance does not differ in situations where defendant voluntarily changes its interpretation of a statute or where that change is thrust upon the department by a court decision. Therefore, there is no legitimate basis on which to distinguish between the two situations in determining whether defendant should be bound by its earlier interpretation.

268 Mich App at 362-363 (footnotes omitted).

The Court of Appeals also correctly concluded that prior SBT nexus cases from that court did not address *D'Amico*. The Department argues that the Court of Appeals erred when it did not reach the same result as prior decisions in *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286; 590 NW2d 612 (1998), *Rayovac Corporation v Dep't of Treasury*, 264 Mich App 441; 691 NW2d 57 (2004), and *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38; 706 N.W.2d 460 (2005). The Court of Appeals correctly addressed this argument in its Opinion:

We begin by noting that this Court held that *Gillette* may be applied retroactively in *Syntex Laboratories v Dept of Treasury*.⁵ But it did so only in response to a constitutional due process argument by the petitioner. The *Syntex* decision does not address the issue here, whether defendant is precluded from applying *Gillette* retroactively because of its previously published rulings.⁶

* * *

Thus, while *Rayovac* considered the argument whether defendant is bound by those earlier revenue rulings under various theories advanced by plaintiffs, it did not specifically consider the applicability of *D'Amico*. Accordingly, we do not view *Rayovac* as being dispositive on this point.

⁵ 233 Mich App 286, 292-293; 590 NW2d 612 (1998).

⁶ Similarly, this Court's recent decision in *J W Hobbs Corp v Dep't of Treasury*, ___ Mich App ___, ___ NW2d ___ (Docket No. 254069, issued

9/1/05), which merely follows *Syntex*, does not address the issue we find controlling.

268 Mich App at 361, 364.

The Court of Appeals' conclusion that it was not bound by the prior published decisions is unquestionably correct. The basis of the Court of Appeals' decision in this case was this Court's decision in *D'Amico*. The prior decisions in *Syntex*, *Rayovac*, and *Hobbs* do not discuss, address, apply or even mention the *D'Amico* decision. Therefore, they are not controlling regarding the application of the *D'Amico* rationale. The rule of law in Michigan established by this Court is that the doctrine of *stare decisis* does not apply where the issue before the court was not considered in a prior case even if the issue before the court is closely related to the issue decided in the prior case. *Sizemore v Smock*, 430 Mich 283, 291 n 15; 422 NW2d 666 (1988).

It has long been recognized that a case has no precedential value and provides no guidance on issues not addressed by the Court. *People v Doyle*, 203 Mich App 294, 297; 512 NW2d 59 (1994) *rev'd on other grounds* 451 Mich 93 (1996). In *Doyle, supra*, the Court held that this Court's retroactive application of a decision does not constitute precedent for the proposition that such retroactivity does not violate due process where that constitutional issue was not raised or considered by the Court. *See also Moinet v Burham, Stoepel & Co*, 143 Mich 489, 491; 106 NW 1126 (1906) (holding that decisions are not binding authority upon propositions that should have been considered, but were not.) "[A] case is *stare decisis* on a particular point if the issue was 'raised in the action decided by the court, and its decision made part of the opinion of the case.'" *Terra Energy, Ltd v State*, 211 Mich App 393, 399; 616 NW2d 691 (2000) (quoting 20 Am Jur 2d Courts, §153, p 440) (emphasis added); *see also People v Alter*, 255 Mich App 194, 201 n.1; 659 NW2d 667 (2003) (holding that for a decision to be authoritative, it must "show application of the judicial mind to the subject"); *Detroit v Public*

Utilities Comm'n, 288 Mich 267, 299, 286 NW 368 (1939) (same); *Brecht v Abrahamson*, 507 U.S. 619, 631; 113 SCt 1710; 123 L Ed2d 353 (1993) (a prior decision is not precedential under *stare decisis* where it does not “squarely address” the issue before the court). The Department’s argument is contrary to long-established law holding that the precedential effect of a decision should be determined by looking at the opinion. *Michigan State Bank v Hammond*, 1 Doug 527, 534 (Mich 1845)

Furthermore, to the extent that the prior published decisions even touch on the concept of fairness and reliance, they support Appellees’ position, not the Department’s. For example, in *Hobbs*, the majority noted that the Department’s position was fundamentally unfair but felt, erroneously, that it was bound by the prior decision in *Rayovac*, *supra*. Specifically, the *Hobbs* majority held:

Judge O’Connell, in his Shakespearean dissent, attacks the actions of defendant in issuing conflicting interpretations of Michigan’s SBT. While we share the sentiments of our colleague as stated in his eloquent soliloquy, we are unable to ignore the holding of *Rayovac* or to torch its application by distinguishing it away on the basis of the size of plaintiff’s sales force. To ignore the application of *Rayovac* to this case, notwithstanding our shared disgust of the “bait and switch” tactics of defendant, would be contrary to binding precedent.

Hobbs, *supra*, 268 Mich App at 47 (emphasis added).

The Judge O’Connell, in his dissent in *Hobbs*, eloquently pointed out the fundamental unfairness of the Department’s actions as follows:

In *Rayovac Corp. v. Dep’t of Treasury*, 264 Mich App 441, 444-448; 691 N.W.2d 57 (2004), this Court braided three separate concepts it gleaned from distinct branches of law into a single lash that enabled defendant to drain years of back taxes from an unwitting Wisconsin battery manufacturer that claimed it was not, and never had been, subject to Michigan’s single business tax. The first concept was a neutered “nexus” requirement that allowed defendant to tax any manufacturer that ever sent a living representative into the state to solicit purchase orders. The second was the retroactive effect of opinions, regardless of how potentially devastating, unforeseeable, and inequitable. The third, and most sinister, was the idea that the manufacturer could not estop defendant from collecting the taxes even though defendant had issued official advice and

memoranda reassuring the manufacturer that it could do business in the state without fear of taxation.¹

¹If I were writing on a clean slate, I would require defendant to follow its own published interpretations contained in Revenue Administrative Bulletin 1989-46 and its SBT Bulletin 1980-1. To hold otherwise allows defendant to "bait and switch" taxation policies, increasing business transactions in the immediate future and setting the stage for a surprise tax on those transactions after they are completed and irreversible. *Cf. Newsweek, Inc. v Florida Dep't of Revenue*, 522 U.S. 442, 444, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998). I find that position untenable. Tea has been thrown into Boston Harbor over taxing tactics less onerous than this oppressive retroactive exaction. At least the 1773 Parliament did not subject American colonists to a tax on tea they had already drunk.

The majority in this case takes up these lithe concepts and adds a twist, surmising that, although it is not sure whether defendant's latest grasp at liberalizing the "nexus" requirement violates the Constitution, defendant may nevertheless stretch as far back through the years as it chooses and fill its treasury with whatever it may find. This grand grope is allowed despite defendant's years of inveigling official statements declaring that its arms were too short to tug on plaintiff's coattails, let alone reach into its pockets.²

² Not only does defendant's sudden policy switch blow a dark cloud over this state's credibility, it forces out-of-state businesses to think twice about doing business in this state. Plaintiff has learned the hard way the truth of Hamlet's exhortation that an administrator "may smile, and smile, and be a villain...." Shakespeare, *Hamlet*, act 1, sc 5. Trust is the cornerstone to a good business foundation, and if an outside business cannot trust this state's interpretation of its own tax laws, how can it trust the state enough to build and grow here?

Because this panel lacks the power to overrule *Rayovac*,³ I would simply distinguish it on the basis that the manufacturer's sales force in that case consisted of three salespeople and their regional manager. While negligible, this meager "force" arguably fell within the meaning of the phrase "sales force" as it was used in *Quill Corp. v North Dakota*, 504 U.S. 298, 315, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), to describe a satisfactory "nexus" between the manufacturer and a taxing state. In this case, the solitary "salesperson" was employed by an independent contractor and did not deal exclusively in plaintiff's goods. Therefore, plaintiff did not have the necessary "presence" in this state and the salesperson cannot represent a sales "force" within any meaningful interpretation of that word. *Quill Corp*, *supra* at 311, 315, 112 S.Ct. 1904; see also *Rayovac*, *supra* at 444, 691 N.W.2d 57. The salesperson did not transfer any title to goods because he merely relayed the sales through a catalog. *Cf. Rayovac, supra* at 447, 691 N.W.2d 57. Therefore, not even a liberal interpretation of the *Quill Corp* nexus requirement would support a finding of a nexus in this case, and we should affirm the Court of Claims on this alternate ground.

³ I note that, absent *Rayovac*, there is sufficient legal basis to deny defendant the retroactive relief it requests. Defendant's repeated, consistent, and official reassurance that plaintiff's activities were not taxable should equitably estop it from recovering taxes it previously declared were not owed. *Fisher v Muller*, 53 Mich App 110, 127; 218 N.W.2d 821 (1974). It would be ignorant to assume that business decisions are not influenced by such a basic and inescapable economic force as taxation. The fact that defendant may have assessed penalties against plaintiff for following its advice and not paying the tax would also bear on the issue. I encourage the court, on remand, to allow plaintiff an opportunity to develop a record regarding the business decisions it made while suffering under the false sense of security offered by defendant's retracted assurance of immunity.

Hobbs, supra, 268 Mich App at 54-56 (O'Connell dissenting).

The Court of Appeals below also was not bound by the unpublished decisions cited by the Department and this Court is obviously also not bound by those decisions. In its Brief, the Department cites four unpublished Court of Appeals decisions.⁹ None of those decisions even mentioned *D'Amico* and are therefore not precedential on the application of *D'Amico* to this matter. Furthermore, the decisions are each based on very narrow grounds¹⁰ and are unpublished and therefore have no precedential effect. See MCR 7.215(C)(1).

B. A New, Contradictory Interpretation Of The Business Activity Nexus Standard Should Apply Prospectively Under Michigan Case Law

Standard of Review

The standard of review is stated in Section II hereof and incorporated by reference.

⁹ These decisions are *Topps Co, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals (Docket No. 203495, June 11, 1999), *Redken Laboratories v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals (Docket No. 221439; Sept. 18, 2001), *Cosmair, Inc. v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals (Docket No. 198240, March 20, 1998), and *Acco Brands, Inc. v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals (Docket No. 242430, November 20, 2003).

¹⁰ *Redken, supra*, dealt only with claims based on due process, equal protection, and estoppel. *Acco, supra*, dealt primarily with claims based on due process and laches. *Cosmair, supra*, dealt with claims of equal protection and uniformity of taxation. *Topps, supra*, dealt with only with estoppel.

Preservation of Issue

The challenge to the retroactivity of the Department's new expanded nexus standard was raised throughout Appellees' Complaints, addressed in the Department's Motion for Summary Disposition and in Appellees' Responses thereto. The issue was also briefed to the Court of Appeals.

There is no question that Appellees' limited contacts with Michigan consisting only of employee sales solicitors did not create nexus under the Department's Employee Sales Solicitation Nexus Standard, the only standard in effect during the years at issue. Appellees' sales solicitations, where orders were approved and shipped outside the state, were specifically declared by SBT Bulletin 80-1 and RAB 89-46 not to subject Appellees to SBT. Moreover, Lenox's two sales solicitors and IHF's eight to ten sales solicitors fall well below the 18 full-time resident sales solicitors and inventory found to create statutory business activity nexus in *Gillette*. Thus, retroactive application of the *Gillette* business activity nexus standard would not require Appellees to be subject to the SBT. Professor Pomp, of the University of Connecticut, has opined that the Department need not have retroactively changed its statutory business activity nexus standard to comply with the *Gillette* decision. See App 7b and 65b, Affidavit of Professor Pomp, ¶38. Fundamentally, Appellees challenge the Department's retroactive application of a new **statutory** nexus standard to assess SBT when the Department had previously assured Appellees that it would not assess SBT. The Department has disingenuously argued that this case is solely about retroactive application of the constitutional Due Process or Commerce Clause nexus standards. It is not. Appellees challenge the retroactive application of a new expanded statutory nexus standard. Because the Department knew it was interpreting business activity nexus, not applying PL 86-272, when it issued its published guidelines, changes

to this standard should be applied prospectively.

1. RAB 98-1 Should Be Prospectively Applied Because of Reliance

The statutory jurisdictional standard being applied to Appellees in RAB 98-1 is a change from Employer Sales Solicitation business activity nexus standard created in 1980 and from *Gillette*. Courts have been particularly loath to allow the state to retroactively change longstanding statutory interpretations. *People ex rel Blair v Mich Cent R Co*, 145 Mich 140; 108 NW 772 (1906) (holding that a longstanding interpretation should not be retroactively changed). Michigan Courts have held that the Department cannot retroactively change its statutory interpretations where there is longstanding reliance on the Department's prior position. In *D'Amico*, the taxpayer relied on the Department's original interpretation that lottery proceeds were exempt from inheritance tax. The Department later announced that it was abandoning its original interpretation based on a court case upholding the new position. The Court, however, prohibited the Department from retroactively applying the new standard to redetermine the taxpayer's inheritance taxes since the public had relied on the Department's prior interpretation. 435 Mich at 560 (quoting Sands, Sutherland, *Statutory Construction* (4th ed) §49.05, p. 362). The Court held that taxpayers engaging in activities in reliance on the Department's position should be afforded the contemporaneous construction of the law. *Id.* at 564. Similarly, in *D'Amico, supra*, the Court held that an administrative agency having interpretative authority may reverse its prior interpretation, but the new interpretation will apply prospectively from the date of the Department's issuance of a new standard. The same rationale applies here. The Department should be precluded from retroactively enforcing RAB 98-1 changing the interpretation of the business activity jurisdictional standard, when taxpayers such as Appellees have long relied on the Department's original interpretation and the judicial determination under *Gillette*.

Michigan courts have long held that equitable remedies can apply where taxpayers have relied on Departmental interpretations to their detriment. In *Campbell v Dep't of Treasury*, 77 Mich App 435; 258 NW2d 508 (1977), the plaintiff relied on the Department's letter reopening its 30 day period to file an appeal. The Court of Appeals refused to allow the Department to repudiate its holding at the Attorney General's urging, noting that there was no statute forbidding the Department from allowing a delayed appeal upon showing of good cause. Here, there is the same good cause – reliance on the Department's written position - and no statute forbids prospective application of the new business activity nexus standard under *Gillette* or RAB 98-1.

To allow the Department to retroactively change its statutory interpretation and supersede the case law will undermine public confidence in the integrity and reliability of the Department. At both the federal and state level, policymakers have been prohibited from retroactively changing longstanding statutory interpretations. The Internal Revenue Service's interpretations of tax statutes, particularly ambiguous statutes, are generally prospectively modified. Internal Revenue Code Section 7805(b) provides that rulings may be applied without retroactive effect even when applying judicial decisions. In fact, longstanding interpretations of ambiguous statutes have been held to be binding on the Commissioner. *Rauenhorst v Comm'r*, 119 TC 157 (2002) (holding that revenue rulings are concessions by the Commissioner and Commissioner is bound to follow the ruling relevant to the case). The Department of Treasury should be similarly required to follow its own rulings. Moreover, requiring the Department to follow its RABs until revoked creates equal treatment between taxpayers who have requested a private letter ruling and those who have not. If a concerned taxpayer had requested a letter ruling in 1988 on SBT nexus, rather than rely on SBT Bulletin 80-1, the Department would be bound by its no nexus determination to that taxpayer for the tax period at issue. See RAB 89-34. However, a more

trusting taxpayer merely relying on the published SBT Bulletin 80-1 may have its position retroactively modified. The Department's failure to exercise its authority to prospectively apply RAB 98-1 is an abuse of discretion, because the Department invites taxpayers to rely on published RABs in lieu of requesting individualized rulings and having done so, should not be permitted to pull the rug out from under its invitees while simultaneously protecting less trusting taxpayers against retroactive revocation of their letter rulings.

Like *In re D'Amico Estate, supra*, this Court should be guided by *Comm'r of Rev v Bay Middlesex*, 659 NE2d 1186 (1996), holding that the Massachusetts Tax Commissioner may not retroactively change its statutory interpretation contrary to its prior written guidance. In *Bay Middlesex*, the Commissioner had established a rule for calculation of gain or loss on bonds in the early 40's and, based on new research, began issuing retroactive assessments in the late 80's. The Court found that the Commissioner's interpretation was in accordance with an ambiguous statute and had been the construction since adoption of the statute. The Court held that deviation from the Department's written guidelines may undermine public confidence in the Department's integrity and impartiality "because collection of back taxes based on new policy allows for selective assessment that is unfair to taxpayers." *Id.* at 1190. The Court held that administrative agencies must abide by their own promulgated policies whether issued under a formal rule or informal guidelines. *Id.* at 1188-1189. The Court noted that the Commissioner could change its policy by prospectively announcing and applying the new rule.

This Court should follow the principles of *Bay Middlesex* and issue a similar holding. The Department should be required to adhere to its promulgated Sales Solicitation Employee Standard, as modified by the *Gillette* 18 resident sales solicitors and in-state inventory standard, until the issuance of RAB 98-1.

2. *Newsweek Prohibits Bait And Switch In State Tax Administration*

The Supreme Court decision in *Newsweek, Inc v Florida Dep't of Rev*, 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998), further supports Appellees' argument here. Newsweek magazine filed a claim for refund for sales taxes it had paid between 1988 and 1990 after a statute exempting newspapers, but not magazines, from such tax was found unconstitutional. The Department of Revenue denied the claim and Newsweek filed suit, alleging that Florida's failure to afford it relief violated its due process rights. The trial court granted summary judgment against Newsweek and the District Court of Appeals affirmed on the grounds that Newsweek should have pursued a pre-payment remedy. The Supreme Court reversed, holding that due process prevented Florida from applying a requirement that Newsweek "litigate first and pay later" since Newsweek reasonably relied upon the apparent availability of a postpayment refund procedure when it paid the sales taxes. At the time Newsweek paid the sales taxes, there was a longstanding practice of permitting taxpayers to seek refunds for taxes paid under an unconstitutional statute. The Supreme Court found it improper for a State to "bait and switch" by holding out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after disputed taxes have been paid, that no such remedy exists." *Id.* (citing *Reich v Collins*, 513 US 106; 115 S Ct 547; 130 L Ed 2d 454 (1994)).

If the Department of Treasury is permitted to retroactively enforce RAB 98-1, it would violate the "no bait and switch" rule elucidated by the Supreme Court in *Newsweek*. For 17 years, the Department instructed taxpayers that the Employee Sales Solicitation Nexus Standard was the proper jurisdictional standard for taxability under the SBTA and the Department enforced the law accordingly. Then, only after an unforeseen decision by the Court of Appeals in *Gillette* on the constitutional nexus standards, did the Department change its position on statutory business activity nexus, expansively reinterpret the *Gillette* decision and issue RAB 98-

1, retroactively creating a new nexus standard for the prior 10 years. The Department cannot “bait and switch” by holding out one jurisdictional standard as being correct and then declare, only after Appellees have relied on that jurisdictional standard for more than a decade, that another jurisdictional standard was the correct standard all along.

3. Prospective Application of a New Standard is Preferred Under Michigan Case Law

The *Gillette* decision does not repudiate the Employee Sales Solicitation Nexus Standard, but only modifies it to a quantity of sales solicitors (18) that creates nexus. The *Gillette* modification should be applied on a prospective basis, but even if it applied retroactively, Plaintiff would not have nexus under *Gillette*. In no event should the Court countenance the Department’s attempt to retroactively apply a vastly expanded business activity nexus standard under the guise of interpreting *Gillette*. Nowhere in *Gillette* did the Court of Appeals hold that the mere temporary presence in the state of an employee for two days or less creates business activity nexus. Nowhere in the statute is this standard implied. No person reading *Gillette* could have reasonably anticipated the Department’s all encompassing expansion of the business activity nexus standard. The business activity definition in MCL 208.3(2) is ambiguous and taxpayers relied on Departmental interpretation of this standard. There is no justification for retroactive application of RAB 98-1 and to do so is punitive to those who justifiably relied on the Department’s published guidelines.

Fundamentally, Appellees challenge the retroactive application of a new rule of law created by the Department. The legal standard for determining when a court decision should be applied retroactively was expressed in *Line v Michigan*, 173 Mich App 720; 434 NW2d 224 (1988), *lv den* 433 Mich 897 (1989):

In determining whether a new rule of law should be applied retroactively, the following factors are pertinent: (1) the purpose of the new rule; (2) the general

reliance upon the old rule; and (3) the effect of full retroactive application of the new rule on the administration of justice.

Moreover, prospective application is preferred over full or limited retroactive application when overruling an established precedent or when deciding an issue of first impression whose resolution was not clearly foreshadowed.

While *Gillette* does not create nexus for Appellees, prospective application of the Department's administratively created new business activity nexus standard is warranted because all of the *Line* factors that weigh in favor of applying a court decision prospectively are satisfied.

No legitimate purpose would or could be served by retroactive revocation of the Department's Employee Sales Solicitation Nexus Standard. Retroactive application of the *Gillette* business activity nexus standard only serves to punish Appellees for relying on the published guidance of the Department and discounts the value of guidance provided by the Department in the future. The Department expected, intended, and required that persons engaged in business activity rely on and follow its Employee Sales Solicitation Nexus Standard as the proper jurisdictional standard for the SBTA. Appellees and the business community did rely on the Nexus Standard Bulletins by not filing tax returns and by restricting their business activity in Michigan. Appellees cannot go back and change their activities when they had no notice of the new standard which was not final until 1995.

Retroactive application of the *Gillette* business activity jurisdictional standard is contrary to established principles of fairness, equity, justice, and sound tax administration, because it undermines public confidence in and reliance on any of the Department's interpretations of tax law. A retroactive policy change is inequitable. Prospective application of the *Gillette* business activity jurisdictional standard is the proper course of action and will enhance the ability of the Department and the courts to administer a just system by ending the current injustice.

Under *Line*, prospective application of a decision is preferred over the rule of retroactivity if the case decides an issue of first impression whose resolution was not clearly foreshadowed. While the holding that the PL 86-272 does not apply to the SBT may be said to have been foreshadowed,¹¹ no one had questioned the Department's interpretation of statutory business activity nexus under MCL 208.3(2) as not extending to the full extent of constitutional nexus and being limited to exclude from taxable business activity the presence of sales solicitors in the state. In fact, state tax expert, Professor Pomp, testifies that limiting nexus to exclude sales solicitation where title transferred outside the state was a reasonable interpretation of the statutory language. Affidavit of Professor Pomp ¶46.

Michigan courts have held that prospective application of a new rule of law is appropriate where there are strong reliance interests. In *Penn Mutual Life Ins Co v Dep't of Licensing & Regulation*, 162 Mich App 123; 412 NW2d 668 (1987), *lv den* 329 Mich 871 (1988), the Michigan Court of Appeals held that a premium tax on out-of-state insurers was unconstitutional because it was discriminatory. *Id.* at 133. Despite the fact that Penn Mutual had sued for a refund, the Michigan Court of Appeals gave its decision prospective effect only. *Id.* The justification given for prospective application was that:

The receipts from the gross premium tax over the years have long since been used by the state and are no longer available for disbursement. Refunds of the magnitude involved here would place undue hardship on the people of this state. Furthermore, the state has justifiably relied on the constitutionality of this tax and balanced the state budget accordingly.

Id. at 133-134 (emphasis added). Similarly, Appellees justifiably relied upon the Department's contemporaneous guidelines that they were not subject to SBT for the years at issue. It is an

¹¹ After all, the Department has admitted that it knew that the SBT was not subject to PL 86-272 when it issued its Bulletins. See SBT Bulletin 80-1, App 2a. See also SBT Bulletin 78-3, App 1b.

undue hardship on Appellees to retroactively subject them to the new, unforeseen, jurisdictional standard,¹² just as it was an undue hardship to subject the state in *Penn Mutual* to retroactive application.

C. The Department's Position Ignores The Plain Language Of The SBTA

The Department argues that “there is only one nexus standard that must be met before the Department may seek to impose SBT” and that standard is the standard of the Due Process and Commerce Clauses of the U.S. Constitution. *See* Department’s Brief at 9-10.¹³ This argument ignores the plain language of the SBTA, which only imposes SBT upon a person with “business activity” in Michigan. *See* MCL 208.31 (imposing SBT on “every person with business activity in this state. . . .”). The SBTA defines “business activity” as follows:

A transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to an employer, services as a director of a corporation or a casual transaction.

MCL 208.3(2).

¹² It would be unfair to hold that retroactive enforcement of the *Gillette* standard against taxpayers was justified, while prospectively enforcing a pro-taxpayer decision like *Penn Mutual*, *supra*, under indistinguishable circumstances. *See also Washtenaw Co v Tax Comm*, 422 Mich 346; 373 NW2d 697 (1985) (court correction of administrative error interpreting property tax law applied prospectively because it would be unfair to governments that spent collected property tax revenue). Businesses have “budgets” to balance just like governments and the detriment to a business of one dollar of tax paid because of retroactive application is precisely the same detriment that a governmental unit suffers when it must refund one dollar of tax because of the retroactive application of a court decision. The money of the government is not more valuable than the money of its citizens.

¹³ *See also* Department’s Brief at 16 (stating that “the Due Process Commerce Clause nexus standard [is] the only one applicable to the SBTA.”).

Thus, the Department's argument that it may impose SBT in any instance in which the Due Process or Commerce Clauses are not violated ignores the specific statutory prerequisites to taxation enacted by the Legislature.

When the Court of Appeals analyzed the proper nexus standard for imposing single business tax in *Gillette*, it looked at Due Process, Commerce Clause and Section 3(2) statutory business activity nexus standards. *Gillette*, supra, 198 Mich App at 311, 313 and 314. The *Gillette* court found that business activity nexus existed because, "its sales representatives, who personally approached Michigan businesses and solicited orders for petitioner's products, provided expertise and advice to those businesses regarding the sale of petitioner's products to their customers, and acted as liaison between those businesses and petitioner." *Id.* at 314. In other words, when title to the product transferred out-of-state, mere solicitation of sales did not create business activity nexus, but the provision of services in the form of advice and business expertise did.

In this case, Appellees' contacts with Michigan were limited to sales solicitation where title transferred outside of Michigan. Appellees' employees did not provide services such as sales advice and business expertise. Thus, Appellees' contacts with the State did not constitute business activity under the statute. Until the Department issued RAB 98-1, the Department agreed that limited contacts of sales solicitors, absent further services, did not create nexus under the Department's Employee Sales Solicitation Nexus Standard. Appellees' sales solicitations, where orders were approved and shipped outside the state, were specifically declared not to subject Appellees to SBT. *Id.* While the *Gillette* Court found that sales advice and business expertise constituted business activity, Appellees' contacts did not rise to this level of activity needed to create nexus.

Another reason the provisions of MCL 208.31 and 208.3(2) are important, and the reason the Department ignores these statutory provisions in its Brief, is because RAB 89-46 was an effort by the Department to interpret the term “business activity.” This can be confirmed by the language of RAB 89-46, which specifically states that it “will use the court cases developed under Public Law 86-272 as a guide when the business activity involves sales of tangible personal property.” *See* App 5a (emphasis added).

As in *D’Amico*, the Department’s interpretation of the statute it administers should be accorded “decisive significance” 435 Mich at 558, and the reversal of such an administrative interpretation should be applied only prospectively. 435 Mich at 562. Such a result is also consistent with Section 3(6) of the Administrative Procedures Act, MCL 24.203(6), which provides the administrative guidelines are binding on the agency that promulgates them.

D. Appellees Did Not Have Sufficient Nexus With Michigan To Justify Imposition of SBT.

Standard of Review

The standard of review is stated in Section II hereof and incorporated by reference.

Preservation of Issues

The issue of whether Appellees fell within the taxing jurisdiction of the State of Michigan has been preserved because it is alleged in Appellees’ Complaints and was addressed in the Department’s Motions for Summary Disposition, Appellees’ Responses, Appellees’ Motions for Summary Disposition and the Department’s Responses. Appellees briefed the issue to the Court of Appeals in their Appellant’s Briefs.

Appellees did not fall within Michigan’s jurisdiction to impose SBT under either the Department’s Employee Sales Solicitation Nexus Standard or that standard as modified by the

Gillette decision. Moreover, Appellees' contacts with the State of Michigan were *de minimis* and did not rise to the level necessary to create nexus.

Michigan's single business tax applies to "every person conducting business activity in the state." MCL 208.31. Thus, in order to fall within Michigan's jurisdiction to tax, Appellees must be conducting "business activity" in Michigan. Business activity has been specifically defined by the Legislature to mean, "a transfer of legal or equitable title to or rental of property. . . or the performance of services, or a combination thereof. . . but shall not include the services rendered by an employee to an employer, services as a director of a corporation or a casual transaction." MCL 208.3(2). Thus, the Michigan Legislature has defined Michigan's taxing jurisdiction, business activity nexus, to require specific contacts with the State that must be present to trigger taxation.

Michigan's business activity nexus is a more limited nexus standard than the U.S. Constitutional nexus standards. Under the Due Process and Commerce Clauses, jurisdiction to tax exists due to the in-state presence of "small sales force, plant, or office." *Quill Corp v North Dakota*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992). MCL 208.3(2) makes it clear that the in-state presence of personnel alone would not create business activity nexus. The personnel must transfer title or perform services other than services of an employee to an employer or as a director of a corporation. The Department, through its Employee Sales Solicitation Nexus Standard, reasonably interpreted MCL 208.3(2) to require more contact than mere solicitation of sales. For example, provision of services to a customer would subject an out-of-state business to Michigan jurisdiction to tax. *See* SBT Bulletin 80-1 and RAB 89-46, App 2a-7a.

Appellees' contacts with Michigan were limited to sales solicitation where title transferred outside of Michigan. Appellees' employees did not provide services such as sales

advice and business expertise. Thus, Appellees' contacts with the State did not constitute business activity under MCL 208.31 and MCL 208.3(2).

Until the Department issued RAB 98-1, the Department agreed that limited contacts of sales solicitors, absent further services, did not create nexus under the Department's Employee Sales Solicitation Nexus Standard. Appellees' sales solicitations, where orders were approved and shipped outside the state, were specifically declared not to subject Appellees to SBT. *Id.* While the *Gillette* Court found that sales advice and business expertise constituted business activity, Appellees' contacts did not rise to this level of activity needed to create nexus.

Moreover, Appellees' contacts with Michigan were *de minimis*. The U.S. Supreme Court has consistently recognized that not all in-state contacts create substantial nexus. In-state contacts that are quantitatively trivial do not create nexus, even though they might create nexus in greater quantities. *Quill Corp, supra; Wisconsin Dep't of Revenue v William Wrigley, Jr, Co*, 505 US 214; 112 S Ct 2247; 120 L Ed 2d 174 (1992); *National Geographic v California Board of Equalization*, 430 US 551; 97 S Ct 1386; 50 L Ed 2d 163 (1977). In *Gillette*, the in-state contacts consisted of eighteen full-time sales solicitors and ownership of promotional and replacement merchandise. *Gillette*, 198 Mich App at 314. Lenox's two Michigan sale solicitors devoted to a multistate region is far less than the eighteen at issue in *Gillette*. Likewise, IHF's eight to ten solicitors is far below that at issue in *Gillette*. No other judicial decision establishes a lower standard for business activity nexus prior to the Department's issuance of RAB 98-1.¹⁴ Thus, Appellees' contacts were too small to create nexus, as well as not being the type of activity to trigger business activity nexus. RAB 98-1, as a new interpretation of statutory law, should be

¹⁴ The Court of Appeals' decision in *MagneTek Controls, Inc v Dep't of Treasury*, 221 Mich App 400; 562 NW2d 219 (1997), is inapplicable because it addressed only the now repealed

imposed only on a prospective basis. Because Appellees' contacts fell far short of the 18 employees found adequate in *Gillette*, their contacts are both quantitatively and qualitatively *de minimis*.

E. The Department's Retroactive Change of the Statutory Jurisdiction Standard Violates The Commerce Clause

Standard of Review

The standard of review is stated in Section II hereof and incorporated by reference.

Preservation of Issue

The Commerce Clause was raised in Appellees' Complaint. The issue was addressed and preserved in the Department's Motions for Summary Disposition and Appellees' Responses as well as Appellees' Motions for Summary Disposition and the Department's Responses. Appellees' briefed this issue in their Appellant's Briefs to the Court of Appeals.

1. Whether a Retroactive Change in the Statutory Jurisdiction Standard Violates the Commerce Clause Nondiscrimination Requirement Has Not Been Addressed By Any Court

Count IV of Appellees' Complaints alleges a violation of the Commerce Clause of the United States Constitution under both the requirement of substantial nexus and nondiscrimination. See Complaint at ¶¶54 to 83. A state tax may be held unconstitutional under any one of the **four** prongs of the Commerce Clause test announced in *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977). A state tax satisfies the Commerce Clause **only if**: (1) the tax is applied to an activity with a substantial **nexus** with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not **discriminate** against interstate commerce; and (4) the tax is fairly related to services provided by the state. *Complete Auto* at

apportionment standard for throwback sales under MCL 208.42, which is applicable only after nexus is established. See discussion *infra* at Section IV.E.3.b.

279. Count IV of the Complaint primarily claims a violation of the discrimination prong of this test. Indeed, some form of the words “discriminate” or “burden” appear in 12 of the 31 substantive paragraphs.¹⁵ Yet, the trial court’s Opinion and Order issued below failed to rule on the Commerce Clause discrimination count. The trial court’s Opinion below relied upon the unpublished decision in *Acco Brands, Inc. v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals (Docket No. 242430, November 20, 2003), which addressed only the first prong – substantial nexus.

In *Acco*,¹⁶ the Court of Appeals granted interlocutory appeal on only two narrow issues: (1) “whether the presence of two resident employees with in the state who solicit orders creates sufficient presence to satisfy the Commerce Clause nexus standard”; and (2) “whether ACCO is entitled to a refund because the notice of intent [to assess tax] was issued several years after receipt of a taxpayer’s information,” as stated in the October 16, 2002 Order by which the Court of Appeals granted the Department’s Application for Leave to Appeal limited the issues to the issues presented in the Application. *See* App 17b (Court of Appeals Order Granting Application for Leave to Appeal). The Department listed only these two issues in its Application for Leave to Appeal. *See* App 18b-22b, which contains relevant pages of the Department’s Application for Leave to Appeal in *Acco*.

The issues that were before the Court in *Acco* have nothing to do with the issues before the Court in this case. Although the Commerce Clause was mentioned in *Acco*, the *Acco* court

¹⁵ In other paragraphs of Count IV, a violation of the “internal consistency test” applied by the United Supreme Court is alleged. *See, e.g.*, Complaint, ¶79. These allegations also relate to whether there has been discrimination against interstate commerce. *See Ashland Oil, Inc v Caryl*, 497 US 916, 919; 110 S Ct 3202; 111 L Ed 2d 734 (1990).

¹⁶ It is clear that *Acco* is not a controlling decision of the Court of Appeals. *Acco* is an unpublished decision and would not control even if it had decided the substantive issues before the Court. *See* MCR 7.215(C)(1).

only addressed one of the four separate tests required under the Commerce Clause, and the test addressed in *Acco* was not the basis of Count I of Appellees' Complaints.

2. A Retroactive Change of the Statutory Jurisdiction Standard Discriminates Against Interstate Commerce in Violation of the Commerce Clause

The Commerce Clause, US Const, art I, §8, cl 3, affirmatively grants to Congress the power “to regulate Commerce with foreign Nations, and among the several States” It is long-established that the Commerce Clause also contains a “dormant” or “negative” aspect that limits the power of the States to discriminate against or burden interstate commerce even in the absence of congressional action. *Southern Pacific Co v Arizona*, 325 US 761, 769; 65 S Ct 1515; 89 L Ed 1915 (1944). See App 8b and 66b (Affidavit of Professor Richard Pomp) at ¶21. See generally Hellerstein, *State Taxation*, 3rd Ed (2000) ¶4.13 *et seq.*

State action can run afoul of the Commerce Clause nondiscrimination requirement if it either (1) discriminates against interstate commerce or (2) imposes a burden upon interstate commerce that is clearly excessive to the putative local benefits. *C & A Carobone v Town of Clarkstown*, 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994). In this case, both prongs of the above test are violated. The Department's action in enticing out-of-state businesses like Appellees into engaging in limited operations in Michigan through assurances of tax immunity and then administratively expanding the holding of *Gillette* and retroactively imposing it on Appellees, both discriminates against and unduly burdens interstate commerce.

3. The Department's "Bait and Switch" Tactics Violate The Commerce Clause Because They Discriminate Against Interstate Commerce

(a) Retroactively Declaring Out-of-State Businesses Are Subject to Single Business Tax Discriminates Against Interstate Commerce

The only businesses adversely affected by the Department's "bait and switch" tactics are businesses based outside of Michigan that were lured to engage in commerce with Michigan customers by a promise of tax immunity, but then subjected to retroactive tax assessments by the Department, even though they complied with the Department's guidelines. Therefore, the Department's actions are facially discriminatory against interstate commerce because they work against and burden only out-of-state businesses. *See Armco Inc v Hardesty*, 467 US 638; 104 S Ct 2620; 81 L Ed 2d 540 (1984).

The Department may argue that it is merely applying the same nexus standard to all businesses, whether Michigan or out-of-state. However, the U.S. Supreme Court has easily found that facially neutral tax schemes violate the Commerce Clause when such schemes discriminate against interstate commerce as applied.¹⁷ It is clear that the Department's bait and switch tactics were directed against, and only adversely affected, out-of-state businesses that engaged in interstate commerce. Unlike out-of-state businesses, Michigan-based businesses cannot be enticed to enter the Michigan market and limit their activities to solicitation in order to comply with the Employee Sales Solicitation Nexus Standard. Thus, non-Michigan businesses engaged in interstate commerce are the only victims of the Department's "bait and switch," by which out-of-state businesses were lured to ply their trade in Michigan with the Department's assurances that they would not be taxed and then retroactively subjected to tax by the

¹⁷ See Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv L Rev 377, 425-433 (1996), App 23b-34b.

Department. State tax expert, Professor Pomp, has opined that the Department's actions discriminate against interstate commerce, because they work against and burden only out-of-state businesses. *See* App 8b and 66b, ¶¶25.

**(b) Retroactively Expanding the Statutory Nexus Standard Results
In Discriminatory Double Taxation of Out-Of-State Businesses
Engaged In Interstate Commerce**

The Department's actions cause a discriminatory effect against interstate commerce, because multistate businesses were subjected to greater state taxation than businesses operating solely in intrastate commerce. The SBT, like the Uniform Division of Income For Tax Purposes Act ("UDITPA"), 7A ULA 356 (1999); MCL 205.581, Article IV apportions a taxpayer's tax base to the taxing state using apportionment factors based upon the taxpayer's sales, property, and payroll. *See Trinova v Michigan Dep't of Treasury*, 498 US 358, 381; 111 S Ct 818, 836; 112 L Ed 2d 884 (1991). Under both the SBT and UDITPA, a taxpayer's "sales factor" is calculated by dividing a taxpayer's in-state sales by its total sales. *See* App 9b and 67b at ¶29. Generally, a transaction is considered a sale within the taxing state if the taxing state was the *destination* of the property sold. *See* MCL 208.581; 7A ULA 392 (UDITPA §15). Both the SBT and UDITPA contained a "throwback sales" provision, which, for state tax apportionment purposes, attribute a taxpayer's sales to the taxing state if the goods were *shipped from* the taxing state and the taxpayer was not "taxable" in the destination state. MCL 208.52(b) (since repealed by 1998 PA 225, effective July 1, 1998); 7A ULA 393 (UDITPA §16). Taxpayers that filed and paid their taxes in other states apportioned their sales in reliance upon the Department's bulletins (i.e., that they were not "taxable" in Michigan). As a result, sales that were destined for Michigan were generally considered as sales to another taxing jurisdiction for purposes of apportionment. The Department's attempt to make taxpayers retroactively taxable in Michigan subjects them to multiple taxation, because the Department is attempting to retroactively

apportion to Michigan those sales that have already been apportioned to other states.¹⁸ The Department's attempt to do so results in unconstitutional multiple taxation of interstate taxpayers. *See* App 9b and 67b at ¶¶31-34. In this case, the Department began auditing Appellees in 1995 for the period beginning January 1, 1989 and did not assess tax until 2001. These actions took place long after the statutes of limitation for filing amended tax returns in other states had expired.

Michigan's Treasurer admits the Department knowingly subjected interstate businesses to multiple taxation. In his February 2, 1998 letter to the Treasurer, David A. Doran, the Vice President – Taxes for Masco Corporation, raised this very issue, asking “how will Michigan solve this problem and protect the taxpayer from double tax?” *See* App 36b. In response, the Treasurer admitted that the Department's position results in double taxation. *See* App 38b-40b, February 25, 1998 letter of Treasurer to Representative Kirk A. Profit (stating that “I also appreciate your concern that this RAB may require certain sales to be included in the numerator of the apportionment factors in two states. . . . In a perfect world, tax credits between states and amended returns would mitigate the effect of any double-counting of sales in the sales factor. Unfortunately, these measures will not eliminate in all cases the issues.”). Thus, the Treasurer knew that retroactive application of a new statutory nexus standard through RAB 98-1 would lead to multiple taxation of multistate taxpayers, making this Commerce Clause violation knowing and intentional.

Taxpayers who relied upon the Department's assurances were disadvantaged in another way – they were denied deductions available in other states for any SBT paid during a tax year.

¹⁸ The statute of limitations for filing amended returns in the other states has long passed. Thus, multistate taxpayers will be subject to multiple taxation of their sales due to the Department's retroactive taxation.

See, e.g., First Chicago NBD Corp v Dep't of State Rev, 708 NE2d 631 (1999) (allowing deduction from Illinois tax for SBT paid); *Kellogg Sales Co v Dep't of Rev*, 10 Or Tax 480, 1987 WL 18463 (1987) (allowing deduction from Oregon tax for SBT paid); *In re Appeal of Kelly Services, Inc*, 1997 WL 466851 (Cal St Bd Eq May 8, 1997) (allowing deduction from California franchise tax for SBT paid). Thus, out-of-state taxpayers who relied upon the Department's assurances, and did not pay SBT during the years at issue, lost tax deductions in other states which were taken by Michigan-based multistate businesses that knew they were liable for SBT.

Furthermore, because the SBT contained a "throwback sales" provision during the years in issue, the Department's action results in a tax that fails the "internal consistency" test announced by the United States Supreme Court.¹⁹ In order to survive scrutiny under the Commerce Clause, a state tax must be "internally consistent" such that "the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Comm v Jefferson Lines*, 514 US 175, 185; 115 S Ct 1331; 131 L Ed 2d 261 (1995). The "internal consistency" test "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared to commerce intrastate." *Id.* The Supreme Court has applied the "internal consistency" test in several cases. *See e.g., Armco, supra*; *American Trucking Assns, Inc v Scheiner*, 483 US 266; 107 S Ct 2829; 97 L Ed 2d 226 (1987); *Goldberg v Sweet*, 488 US 252, 261; 109 S Ct 582; 102 L Ed 2d 607 (1989). In *Armco*, the Court struck down a West Virginia tax scheme that imposed a wholesaling tax upon out-of-state manufacturers but exempted in-state manufacturers. West Virginia attempted to justify the tax because West Virginia manufacturers were subject to a much higher

manufacturing tax. The Supreme Court noted that, despite this, West Virginia's tax scheme violated the internal consistency test because if every other state had the exact same scheme as West Virginia, a manufacturer selling in interstate commerce would pay both the manufacturing tax in the state of manufacture and the wholesale tax in the state in which the product was sold while a manufacturer operating only in West Virginia would pay the manufacturing tax but would be exempt from the wholesaling tax. *Id.* at 644. Because interstate businesses would pay higher taxes if every state adopted West Virginia's tax scheme, the scheme violated the internal consistency test. *Id.*

The Department's actions here similarly violate the internal consistency test. As demonstrated above, if every state had the same tax scheme as Michigan, the Department's retroactive change of nexus standard would result in higher taxes imposed upon businesses operating in interstate commerce than those imposed upon businesses operating only in intrastate commerce, because the state of origin (with identical statutes and Administrative Bulletins) would have already required the seller to "throw back" sales made to Michigan destinations and apportion those sales to the origin state. The Department's retroactive assessment of the same sales results in two (or more) states "double counting" the taxpayers' sales for apportionment purposes. The origin state would claim the sale due to the prior administrative bulletin and the destination state would claim the sale when the nexus standard was retroactively changed.²⁰ As in *Armco*, this result is unconstitutional. Professor Pomp has opined that the Department's

¹⁹ See Hellerstein, *State Taxation*, 3rd Ed (2000), ¶4.15(1), for a discussion of the internal consistency test. App 41b-50b.

²⁰ Assuming all states had Michigan's four year statute of limitations for amending tax returns, which is required when applying the internal consistency test, the taxpayer would have no ability to prevent the double taxation.

retroactive change in the nexus standard and retroactive assessment of SBT violates the internal consistency test for these reasons. *See* App 10b and 68b, ¶¶35-39.

**(c) Retroactively Changing the Statutory Nexus Standard
Discriminated Against Interstate Commerce By Handicapping
Out-Of-State Businesses**

Finally, the Department's bulletins handicapped multistate businesses by requiring them to comply with the Employee Sales Solicitation Nexus Standard restrictions with the promise that they would not be engaged in business activity subject to Michigan Single Business Tax.

In reliance upon the Department's bulletins, Appellees limited their contact in Michigan to solicitation and did not engage in more extensive activities in Michigan. The retroactive application of the *Gillette* business activity nexus standard penalizes out-of-state businesses who limited their operations in reliance upon the Department's bulletins. Such taxpayers are retroactively subjected to the same tax measure as other taxpayers with far more activity in Michigan, despite the fact the affected taxpayers operated at a competitive disadvantage to businesses based in Michigan.

As a result, Appellees competed against in-state businesses with one hand figuratively tied behind their backs. Michigan-based businesses, which knew that they were subject to Michigan SBT, did not limit their business activities in Michigan, as did Appellees. The Department encouraged out-of-state businesses to limit their business activities in Michigan through a promise of tax immunity. There is no doubt that the Courts would invalidate, as offensive to the Commerce Clause, any attempt by a state to so limit the business activities of out-of-state actors by direct regulation. The same result should not be sanctioned when achieved through a tax system, whether intentional or unintentional.

(d) Because The Department's Actions Discriminate Against Interstate Commerce, They Are Invalid Under The Commerce Clause

Because the Department's actions discriminate against interstate commerce, its actions are *per se* invalid unless the Department meets its burden of demonstrating, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Maine v Taylor*, 477 US 131; 106 S Ct 2440; 91 L Ed 2d 110 (1986). State tax expert, Professor Pomp, has affirmed this conclusion. *See* App 11b and 69b, ¶¶41. This burden rests upon the Department, *id.*, and it has not been met here.

4. The Department's Retroactive Expansion of the Business Activity Nexus Standard Violates The Commerce Clause Because It Imposes An Undue Burden Upon Interstate Commerce

Besides discriminating against interstate commerce, the Department's actions unduly burden interstate commerce. The discriminatory effects outlined in Section IV B.1. above all constitute burdens on interstate commerce. In addition, interstate commerce is burdened in a more fundamental way – because interstate actors will be unable to rely upon written guidance issued by state tax administrators and will be unable to structure their interstate business activities to comply with state tax laws. *See* App 12b and 70b, ¶¶49-53.

Any business considering whether to engage in interstate commerce must structure its business activities to comply with, and plan for, the tax and other laws of the states in which it will conduct business. Out-of-state businesses, like Appellees, when considering whether to engage in interstate commerce in Michigan, would have consulted the Department's bulletins as well as the Michigan statutes. Such taxpayers would have learned: (1) that the Department's bulletins stated that taxpayers limiting contacts to the Employee Sales Solicitation Nexus Standard are not subject to SBT; (2) the Department was authorized by Michigan law to

promulgate such bulletins, *see* MCL 205.3(f); and (3) under Michigan law, such bulletins would be binding on the Department, *see* MCL 24.203(6).

The Department's actions in retroactively assessing tax on interstate taxpayers defeat the settled expectations of interstate taxpayers and, if engaged in by other states, would lead to chaos in interstate commerce. If upheld, the Department's actions would instruct businesses engaged in interstate commerce that they could not rely upon guidance given by state agencies and could be subject to retroactive changes in that guidance.

When determining whether state legislation runs afoul of the Commerce Clause, the US Supreme Court has held that "the practical effect of [the challenged legislation] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other states and what effect would arise if not one, but many or every, State adopted similar legislation." *See Wyoming v Oklahoma*, 502 US 437, 453-54; 112 S Ct 789; 117 L Ed 2d 1 (1992). State tax expert, Professor Pomp, has testified that if other states engaged in the same behavior as Michigan, it would discourage economic actors from engaging in interstate commerce and burden interstate commerce. *See* App 13b and 71b, ¶54. In this case, the practical effect of the Department's retroactive application of an expanded business activity nexus standard should be similarly analyzed by examining the practical effect of the action and considering the consequences of the action, how the action interacts "with the legitimate regulatory regimes of the other States," and what effect would arise if other States engaged in similar actions.

Because the Department's actions impose a burden on interstate commerce, they will be upheld only if: (a) they are rationally related to a legitimate state purpose; and (b) the burden imposed on interstate commerce, and any discrimination against it, are outweighed by the

legitimate state purpose. *Southern Pacific, supra*, 325 US 761 at 770-71; *Cities Service Gas Co v Peerless Oil & Gas Co*, 340 US 179, 186-87; 71 S Ct 215; 95 L Ed 190 (1950). In this case, the Department’s retroactive application of a new statutory business activity standard and RAB 98-1 is unconstitutional because it is not rationally related to a legitimate state purpose.

The Department may argue that it is pursuing a legitimate purpose – ensuring that businesses engaged in commerce in Michigan pay their “fair share” of Michigan taxes. But that is not the true “purpose” of the Department’s bait and switch behavior, because it is fundamentally unfair to impose Michigan taxes on businesses that relied upon the Department’s bulletins. The Department actually seeks to impose an “unfair share” of Michigan taxes upon Appellees. Furthermore, one must keep in mind that the challenged state action here is the administrative expansion of and the application of the revised business activity nexus standard *retroactive* for years during which the Department assured out-of-state taxpayers that they were not subject to SBT under its Employee Sales Solicitation Nexus Standard. In *West Lynn Creamery, Inc v Healy*, 512 US 186; 114 S Ct 2205; 129 L Ed 2d 157 (1994), the U.S. Supreme Court held that an administrative order violated the Commerce Clause. *See also, Quill Corp v North Dakota*, 504 US 298, 309; 112 S Ct 1904; 119 L Ed 2d 91 (1992) (noting that Commerce Clause “prohibits certain state actions that interfere with interstate commerce.”) (emphasis added). This Court should similarly find that the Department’s actions violated the Commerce Clause.

F. The Department Is Estopped From Retroactively Changing The Business Activity Nexus Standard

Standard of Review

The standard of review is stated in Section II hereof and incorporated by reference.

Preservation of Issues

Estoppel was raised in Appellees' Complaints, addressed in the Department's Motions for Summary Disposition and Appellees' Responses and was briefed at the Court of Appeals.

The Department's is estopped by its own acts under equitable or promissory estoppel from asserting that Appellees are within the State's taxing jurisdiction. Equitable estoppel exists when: (1) a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on that belief; and (3) the other party will be prejudiced if the first party is allowed to deny the existence of those facts. *See Guise v Robinson*, 219 Mich App 139, 144; 555 NW2d 887 (1996). In this case, the Department represented in its bulletins the fact that a taxpayer adhering to the Employee Sales Solicitation Nexus Standard would not have business activity nexus and the Department would not assess SBT. The Department even issued a Bulletin stating that the Department would be bound by its Bulletins and that taxpayers could rely on them. *See App 14b*. Appellees believed the Department's representation of fact and justifiably relied and acted on that belief by complying with the Employee Sales Solicitation Nexus Standard. Appellees will be prejudiced and liable for retroactive taxes if the Department is allowed to deny its prior representations. All the elements of equitable estoppel are met and the Department should be estopped from claiming that Appellees are within the State's jurisdiction to tax.

Promissory estoppel also exists in this case. The elements of promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced in order to avoid injustice. *See Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). In this case, there was a promise (that the Department would not assess SBT

if a Taxpayer complied with the Employee Sales Solicitation Nexus Standard) that the Department should reasonably have expected to induce action (indeed, the Department told taxpayers they could rely upon its promise) and Appellees did, in fact, rely upon the promise and inequity will result if the Department is allowed to renege on its promise.

The Department argued below that estoppel does not apply because the Department made a misrepresentation of law, not of fact. This is clearly incorrect. While the Department's representation might have been a misrepresentation of law if the Department had rendered a legal opinion that "PL 86-272 applies to the SBT," that is not what the Department represented. In SBT Bulletin 80-1 and RAB 89-34, the Department never stated that PL 86-272 applied to the SBT. Rather, the Department stated that, when interpreting whether a company had SBT nexus, the Department would "use the court cases developed under PL 86-272 as a guide." App 3a and 5a. The Department also represented as a fact that using an employee to solicit orders will not bring the person within the State's statutory jurisdiction to tax and, therefore, the person will not be subject to the SBT. *Id.* Thus, the Department represented a fact, not the law.

The Department has also claimed that estoppel does not apply because the Courts, not the Department, changed the SBT nexus standard. See Department's Tr. Ct. Brief at 8. Again, this is a misrepresentation. Although the Department had to apply the Court of Appeals' decision in *Gillette* prospectively, neither *Gillette* nor any other court decision required the Department to retroactively change the statutory business activity nexus standard. App 10b and 68b, ¶38. The Department alone decided to expand the holding of the *Gillette* decision beyond the finding that 18 full-time employees created business activity nexus. The Department alone decided to retroactively apply the new business activity nexus standard and did so without a mandate from the courts. Appellees are not arguing that the Department is estopped from applying *Gillette*

prospectively nor is the Department estopped from establishing a new expanded statutory nexus standard prospectively. Rather, due to the Department's prior representations, the Department should be estopped from applying a new expanded statutory business activity nexus standard *retroactively* in contravention of the Department's prior factual assertions and promises.

G. It Is Undisputed That There Is A Genuine Issue Of Material Fact Regarding IHF's SBT Liability

Standard of Review

The standard of review is stated in Section II hereof and incorporated by reference.

Preservation of Issues

The issue of the amount of IHF's SBT liability was raised as Count VII of IHF's Complaint. In its Complaint, IHF alleged that the Department's tax liability was an estimated amount and the Department admitted this. See IHF Complaint, ¶8; Answer, ¶8. The Department did not deny that its tax assessment was erroneous but rather stated that it "leaves Plaintiff to its proofs to establish a different tax liability." Answer, ¶117. This issue was addressed in IHF's Response to the Department's Motion for Summary Disposition and in IHF's Motion for Reconsideration with the trial court. The issue was also briefed to the Court of Appeals.

It is undisputed that the Department's assessment of SBT for the time period from January 1, 1989 through December 31, 1992 is an estimated amount that does not reflect IHF's actual SBT liability. IHF was and is prepared to introduce evidence and testimony regarding its actual SBT liability if this Court determines that IHF has sufficient nexus with Michigan such that it is liable for SBT. IHF submitted to the trial court the Affidavit of the State and Local Tax Manager for IHF's parent company, Mr. John Kubeck. (App 51b-53b). In his affidavit, Mr. Kubeck explains that IHF's actual SBT liability for the calendar years 1989 through 1992 is

actually \$300,507, rather than the assessed figure of \$529,396. Mr. Kubeck is prepared to testify at trial regarding this figure.

Indeed, the Department admitted before the trial court that there is a triable issue of material fact remaining in this case. On page 8 of its Brief in Support of Motion for Summary Disposition, the Department cited *Kostyu v Dep't of Treasury*, 170 Mich App 123; 427 NW2d 566 (1988), in which the Court held that a taxpayer is entitled to *de novo* review of a tax assessment and, at trial, the taxpayer has the opportunity to introduce evidence showing the assessment is incorrect. *Id.* at 129.

At oral argument, the Department admitted that there remained a disputed question of regarding the amount of IHF's SBT liability if IHF is liable for SBT. Specifically, the Department's counsel stated: "[a]nd regarding the issue of error, I think it would have been nice if they had shown the auditors the records. But if the Court finds for the Department, I am sure they can work out what the correct tax amount is." Transcript of October 30, 2003 Motion Hearing (App 59b).

Both *Kostyu, supra*, and *Vomvolakis v Dep't of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985) compel the conclusion that the trial court erred in granting summary disposition with regard to the amount of IHF's SBT liability. In both cases, the Court recognized a taxpayer's right to present evidence at trial to refute a tax assessment. *Kostyu*, 170 Mich App at 131; *Vomvolakis*, 145 Mich App at 245. IHF has the right to refute the assessment at trial and there is a triable disputed genuine issue of material fact in this case. The trial court erred in granting summary disposition to the Department as to Count VII of IHF's Complaint and, even if the Court determines that IHF is liable for SBT, this case must be remanded to the trial court for resolution of the issue of the amount of that liability.


V. CONCLUSION

During the years at issue, the Department interpreted the statutory business activity nexus standard under MCL 208.3 as not including persons who limited their activities in the State to sales solicitation under its Employee Sales Solicitation Nexus Standard announced in its published bulletins. The Department's administrative action of retroactively overruling its published guidelines and the *Gillette* Court's 18 sales solicitor standard with a new statutory business activity nexus standard violates the nondiscrimination requirement of the Commerce Clause, is contrary to Michigan case law is unfair. "Men must turn square corners when they deal with the Government, it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens." *Libby, McNeil & Libby v Wisconsin Dep't of Taxation*, 260 Wis 551, 560; 51 NW2d 796, 800 (1952) (quoting Justice Holmes in 48 Harv L Rev 1281, 1299 (1934-35)). See also *Title Insurance Company Of Minn v Bd of Equalization*, 4 Cal4th 715; 842 P2d 121, 14 Cal Rptr 2d 822 (1992) (same). In order to do what's fair and just, as well as honorable, this Court should find in favor of Appellees and hold that the Department may not retroactively apply its expanded nexus standard.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Plaintiffs-Appellees

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By: 
Patrick R. Van Tiflin (P26119)
Daniel L. Stanley (P57052)
222 N. Washington Square, Suite 400
Lansing, Michigan 48933
517/377-0702

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